In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, PETITIONER, *v.* SINCLAIR REFINING COMPANY, RESPONDENT.	No. 213.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* STANDARD OIL COMPANY (NEW JERSEY), Respondent.	No. 637.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* GULF REFINING COMPANY, RESPONDENT.	No. 638.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* MALONEY OIL & MANUFACTURING COMPANY, Respondent.	No. 639.

REPLY BRIEF FOR PETITIONER.

LEASES PROHIBIT LESSEES FROM SELLING GASOLINE OF COMPETITORS.

The argument of counsel for the Standard Oil Company that the restrictive covenant contained in the leases does not bring it within the prohibition

of section 3 of the Clayton Act (Standard Oil brief, pp. 29–31) is not justified. The history of the *Henry* v. *The Dick Co.* litigation is, we believe, conclusive on the point and perhaps clearer than authorities cited in our opening brief, pages 27 to 29.

The Dick Company sold its stencil duplicating machines with the restriction that they should "be used only with a stencil, paper, ink, and other supplies made by A. B. Dick Company." (224 U. S. 25, 26.) The apparatus was patented but the supplies were unpatented.

This court upheld the license restriction. (*Henry* v. *A. B. Dick Company*, 224 U. S. 1.)

Congress was evidently of opinion that the case disclosed a flaw in the law and afforded opportunity for an assault upon competition, and this company was mentioned at length as one of the corporations whose practices were to be prohibited by section 3 of the Clayton Act. Chairman of the Judiciary Committee and sponsor for the bill believed that it would "correct the conditions referred to by Chief Justice White in the Dick case" and was in favor of repealing the opinion in the case of *Dick* v. *Henry*. (Cong. Rec., 63d Cong., 2d sess., p. 17, 1823.)

This court has quoted the language we invoke herein and has declared that Congress has enacted section 3 of the Clayton Act "as if in response to" the decision in *Henry* v. *Dick Company*, 224 U. S. 1. (*Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 517.)

We believe that the equipment leased herein and the stencil-duplicating equipment leased by the Dick Company are absolutely identical in legal status. No doubt exists but that the customers of the Dick Company might have another duplicating outfit purchased from another manufacturer and use supplies of a competitor of the Dick Company therewith. Probably some such purchasers did have a second and competing equipment with competing supplies, just as a small proportion of the gasoline curb stations have a second equipment either owned by the retailers or leased by another company, but in both cases alike the majority of customers no doubt had no such second equipment, and therefore were effectively tied by the restrictive covenant in the lease.

There is not a shade of distinction between the practice in stencil duplicating and in the gasoline trades. Counsel for the Standard Oil Company are, therefore, endeavoring to avoid the express intent of Congress embodied in the Clayton law.

Further mention need be made of the Standard Fashion-Magrane Houston case only to point out that while the covenant therein was in *terms* limited to the particular premises, yet this court after stating that it did not appear that the dealer had any place at which to sell patterns, held that "the *covenant*, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force."

Attention is invited to the fact that the court did not hold that there was an understanding or agreement *collateral* to the main contract by which the dealer agreed not to sell other patterns; but that the *covenant itself* was one by which the dealer agreed not to sell other patterns. A similar conclusion was reached by this court in the United Shoe Machinery Company case. These decisions determine that the covenant, though in express terms limited to one place, or to one set of equipment, or one machine (supra), will be held to prohibit the covenantee from dealing in other goods if from the surrounding facts this is its necessary effect.

If petitioner's contention on this point is sound, then the charge in the complaint that the equipment is leased on the condition, agreement, or understanding that the lessee "shall not purchase or deal in the products of a competitor or competitors of the respondent" was the proper allegation and not an allegation in the words of the covenant itself.

CONTENTION THAT LEASES HAVE INCREASED COMPETITION.

Respondent contends that refiners and wholesalers have induced the entry of more retailers into the trade and have therefore by the use of the practice increased competition. This contention was anticipated in part in petitioner's brief in chief, pages 44 to 47. It may be added, however, that respondent's contention appears to be that because the brands of the various refiners or wholesalers are

displayed at more retail stations and prices quoted their competition is increased. In other words that if there is competition between retailers, elimination of competition between refiners and wholesalers does not violate the statute.

Exactly the reverse of this contention was made in the case of *Dr. Miles Medical Company* v. *Parke & Sons Co.* (220 U. S. 373), where it was contended that competition between manufacturers was all that was necessary to protect the public, and that competition between wholesalers and retailers might be eliminated. This court held, however, that the public was entitled to such competition as could be had between wholesalers and retailers as well as manufacturers.

Similarly, in the case at bar, the statute sought to preserve competition in price, quality, and service between refiners and wholesalers, as well as between retailers. Indeed, the existence of jurisdiction in the Federal Government over competition between retailers being doubtful, the statute is obviously primarily concerned with competition between manufacturers and wholesalers.

Furthermore, proof that during the period covered by the evidence there has been a substantial increase in the number of refiners and wholesale dealers does not necessarily prove increased competition. In a period when consumption of gasoline increased tenfold in five years it would have been remarkable if some new companies had not entered the field, but whether

these companies materially increased competition would depend upon the conditions under which they do business. Certainly, the record here shows that there are thousands of retail dealers to whom these new companies could not sell because of leases of existing companies.

Whether there be increased or lessened competition resulting from a practice must depend upon whether the aggregate of the competition for the trade of each individual customer has increased or diminished. In the present controversy the competition among marketers for the trade of tens of thousands of retailing customers has been absolutely destroyed, by the practice herein challenged, for the duration of each respective lease.

REPLY TO RESPONDENT'S STATEMENT OF FACTS.

Opposing counsel have given what purports to be an outline of the testimony of certain witnesses, on pages 34 to 41, inclusive. This résumé will not bear analysis.

They quote several witnesses to the effect that the practice of loaning with restrictive covenant came into vogue at the same time with the use of the improved equipment loaned. This is inaccurate evidence, or, strictly speaking, it is evidence of a situation limited historically to a small part of the country. It may be that in a few districts along the Atlantic seaboard the leasing with restrictive covenant grew up at about the time the improved equipment came on the market; but the record includes the testimony

of some fifteen representatives in Atlantic coast States of pump and tank manufacturing houses. These men prove that the equipment business had antedated and been in flourishing condition before the loaning thereof with restrictive covenant had gained any headway. (Vol. 2, pp. 82–166; 240–253; 367-388.) The leasing and loaning practice has since to a large degree reduced the sales of equipment to the companies marketing gasoline in the Eastern States to bulk sales for leasing purposes.

It will be borne in mind that in Ohio and the eastern Mississippi Valley the practice was introduced at a considerably later date, whereas between the Mississippi and the Rocky Mountains it had not, when the testimony closed, proceeded to any great degree. (Record, Vol. III, 241.)

When to this is added the fact that in Pennsylvania and Delaware the local member of the Standard Oil group, when the record closed, was still selling four-fifths of its equipment and could sell in the other one-fifth of instances were it not that the gratuitous loaning practice is well known there, and when it is further added that the greatest gasoline distributing organization in the world, the Standard Oil of Indiana, regards the practice as indefensible, and when it is recalled that the numerous small companies in all the records condemned the practice, we submit that there is not the slightest reason for believing that there is any need of a restrictive covenant in order to secure adequate installation, sufficient outlets for the product, public convenience or safety,

protection to brands, facilities for advertising, or any of the things which, we believe as subterfuges, have been alleged as the excuses for the tying up of tens of thousands of retail dealers in the eastern third of the United States.

Surely the Standard Oil Company of New Jersey, and that of New York, the Texas Company, the Gulf Refining Company, and the Sinclair Company are no more fond of advertising, nor do their brands require protection other than a removal of sign when the retail dealer changes refiners, if the other great companies mentioned do not feel the need of such protection. (See our opening brief, pp. 52–64.)

In view of opposing counsel's recitation of the evidence, we wish to add a few words with regard to the small gasoline marketer. The commission holds no brief for the small as contrasted with the great company. The line of cleavage leaves some small companies on one side of the law and some on the other, just as the great companies are divided.

Certain small companies, it is shown by the record, have been just as desirous to secure an exclusive string of retail stations for their distributing tank wagons. Several of them, in this record, pleaded for the privilege of effectually restricting dealers to their own product in order to hold the territory against the great company.

But the Clayton Act, the Federal Trade Commission Act, and the decisions of the commission do not discriminate in favor of the small as against the great trader, and the little men have no more right to

restrict the great marketer than the great have to restrict the less. The public have the paramount right, to wit, that of not having retailers, wholesalers, or middlemen freed from competition by the employment of leases which, under the circumstances, directly operate to lessen competition.

The loaning practice with restrictive covenant may have been, during the period when gasoline consumption was increasing by leaps and bounds, a convenient means for companies, including numerous small ones, to enter fields not fully occupied.

But the time will arrive, perhaps shortly, when there will no longer be an unabsorbed increment of demand constantly inviting the marketer, but, on the contrary, there will ensue in this line, as in others, a comparatively stabilized situation when there will be approximately as many retailers in any given district as there is any business demand for.

If these retailers be subject to exclusive covenant, the company attempting to enter such field will be unable to secure tank-truck routes, since prospective retailers can not enter a field fully occupied, nor will existing retailers install additional equipment for which they have no need.

When such time arrives and the existing tanks and pumps are all subject to exclusive leases, competition will be confined to companies already in any such district and such residuum of competition will be dormant, for the reason that each company

will be free from any competitive influence operating upon its own retailers.

This, we believe, constitutes a substantial and dangerous hindering and lessening of competition within the meaning of section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act.

We have urged most forcibly section 3 of the Clayton Act for the reason that we believe that therein, under construction of this court, Congress has specifically prohibited the practice in question. If, however, by using phraseology which seems to fall short of, though in view of the circumstances it really effects, a complete prohibition of the use of the product of a competitor the respondents be held to escape the letter of the Clayton Act, they still violate the Federal Trade Commission Act.

The latter act is intended to protect the public against methods which tend to lessen competition or to create a monopoly. (*Federal Trade Commission* v. *Beech-Nut Packing Co.*, 42 Sup. Ct. Rep. 150.) Practices which tend to that end if within the spirit of the two enactments, are subject to the order of the petitioner under the Federal Trade Commission Act.

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